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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CHRISTOPHER GAHR,	)	CIVIL NO. 03-00567 JMS BMK
	)	
Plaintiff,	)	DEFENDANT'S PROPOSED
	)	SUPPLEMENTAL JURY
vs.	)	INSTRUCTIONS; CERTIFICATE OF
	)	SERVICE
MICHAEL CHERTOFF, Secretary,	)	
DEPARTMENT OF HOMELAND	)	
SECURITY,	)	
	)	
Defendants.	)	
_____	)	

DEFENDANT'S PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS

Comes now, Defendant Michael Chertoff, and hereby  
submits his proposed supplemental jury instructions.

DATED: April 24, 2007, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.  
United States Attorney  
District of Hawaii

/s/ Thomas H. Helper  
By \_\_\_\_\_  
THOMAS A. HELPER  
Assistant U.S. Attorney

Attorneys for Defendant

DEFENDANT'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 1

Non-Discriminatory reason - Pretext

In determining whether the defendant discriminated against plaintiff, you must consider whether management honestly believed its justifications for discharging plaintiff. If you find that management's stated reasons were actually a pretext for race and national origin discrimination and/or retaliation, you must find for plaintiff. If, on the other hand, you believe those justifications were honestly believed by management, you must find for the defendant, even if you believe management's justification was foolish or trivial.<sup>1</sup>

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<sup>1</sup> Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002).

DEFENDANT'S PROPOSED SUPPLEMENTAL INSTRUCTION NO. 2

Business Judgment

Your duty is not to decide whether the defendant's business judgment was sound. An employer is entitled to decline to promote or to give an adverse performance evaluation to an employee for any reason that is not unlawfully retaliatory or discriminatory. As long as the employer had a legitimate, non-discriminatory reason for taking action affecting an employee, the employer has not violated the law. You must bear in mind that an employer is entitled to make its own subjective business judgments, however misguided they may appear to you, and may overlook one employee in favor of another, select one person over the another, reassign, demote, or discharge an employee for any reason that is not illegally retaliatory or discriminatory. The relevant question is simply whether the employer's stated reasons were not true and whether the actions taken were actually intended to retaliate against the plaintiff for prior EEO activity. The fact that you may disapprove of the defendant's stated reasons in this regard is irrelevant.

You must bear in mind that the focus of your decision must be on the defendant's intent and motivation and not on its business judgment. The test is not whether you approve of the way the defendant did business. The test is not whether the defendant's reasons were good or bad or whether there was a more

enlightened or more efficient way to operate, or whether you think what the defendant did was fair or unfair, kind or unkind, wise or unwise.

**Source:** This instruction is derived from Casillas v. Navy, 735 F.2d 338 (9th Cir. 1984); Texas Dept. Of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, n. 6 (1st Cir. 1979).

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Plaintiff,	)	CERTIFICATE OF SERVICE
	)	
vs.	)	
	)	
MICHAEL CHERTOFF, Secretary,	)	
DEPARTMENT OF HOMELAND	)	
SECURITY,	)	
	)	
Defendants.	)	
_____	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

Served by Facimile at 808-523-1088:

Moises A. Aviles	April 24, 2007
Aviles & Associates	
560 N. Arrowhead Ave., Suite 2A	
San Bernardino, CA 92401	

Served Electronically through CM/ECF:

G. Todd Withy	April 24, 2007
<a href="mailto:Withylawcourt@aol.com">Withylawcourt@aol.com</a> , <a href="mailto:withylaw@aol.com">withylaw@aol.com</a>	

Attorneys for Plaintiff  
CHRISTOPHER GAHR

DATED: April 24, 2007, at Honolulu, Hawaii.

/s/ Coleen Tasaka-Shoda

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